INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	15
Appendix	16

CITATIONS

Cases:

Boyle, County Treasurer v. *United States and Federal Public Housing Authority*, No. 69, October Term, 1944, decided January 2, 1945	7
City of Cleveland v. *United States and Federal Public Housing Authority*, No. 68, October Term, 1944, decided January 2, 1945	7
City of Springfield v. *United States*, 99 F. 2d 860, certiorari denied, 306 U. S. 650	7
Federal Public Housing Authority v. *Guckenberger*, No. 388, October Term, 1944, decided January 2, 1945	7
Irwin v. *Wright*, 258 U. S. 219	10
Kansas Indians, The, 5 Wall. 737	9
Lee v. *Osceola Imp. Dist.*, 268 U. S. 643	7
McCurdy v. *United States*, 246 U. S. 263	11
McCurdy v. *United States*, 264 U. S. 484	11
Mayo v. *United States*, 319 U. S. 441	7, 12, 13
Minnesota v. *United States*, 305 U. S. 382	11
New York Indians, The, 5 Wall. 761	9, 10
Oklahoma Tax Comm'n. v. *United States*, 319 U. S. 598	11
Scripps-Howard Radio v. *Comm'n*, 316 U. S. 4	13
Shaw v. *Oil Corp'n*, 276 U. S. 575	11, 13, 14, 15
Shoshone Tribe v. *United States*, 299 U. S. 476	2
United States v. *Albama*, 313 U. S. 274	7
United States v. *Allegheny County*, 322 U. S. 174	7, 8, 13
United States v. *Rickert*, 188 U. S. 432	8, 9, 11
United States v. *Shoshone Tribe*, 304 U. S. 111	2, 9
United States v. *Stewart*, 311 U. S. 60	13
Van Brocklin v. *Tennessee*, 117 U. S. 151	7
Wisconsin Railroad Co. v. *Price County*, 133 U. S. 496	10

626162—45——1

Constitution and statutes:

	Page
U. S. Const:	
Art. IV, sec. 3	8
Art. VI	7, 8
Act of March 3, 1905, 33 Stat. 1016	3
Act of June 25, 1938, 52 Stat. 1114	3
Act of July 27, 1939, 53 Stat. 1128, 25 U. S. C. secs. 571–577 (Shoshone Judgment Fund Act)	3, 10, 14, 16
Miscellaneous:	
H. Rep. No. 1112, 76th Cong., 1st sess	14
19 Op. A. G. 161	8
S. Rep. No. 746, 76th Cong., 1st sess	14

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 786

THE BOARD OF THE COUNTY COMMISSIONERS OF THE COUNTY OF FREMONT, WYOMING: GEORGE C. MCRAE, TREASURER OF FREMONT COUNTY, WYOMING; AND ERNEST H. HARTMAN, ASSESSOR OF FREMONT COUNTY, WYOMING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 26–32) is reported in 53 F. Supp. 395. The opinion of the circuit court of appeals (R. 39–44) is reported in 145 F. (2d) 329.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on October 10,

1944 (R. 44). The petition for a writ of certiorari was filed on December 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a state may tax lands purchased by the United States pursuant to the Shoshone Judgment Fund Act of 1939, title to which is held by the United States in trust for the Shoshone and Arapaho tribes of Indians of the Wind River Reservation, Wyoming.

STATUTE INVOLVED

The pertinent statute is set out in the Appendix, *infra*, pp. 16–20.

STATEMENT

In 1938 the Shoshone Tribe of Indians recovered a judgment against the United States for an amount in excess of four million dollars. *United States* v. *Shoshone Tribe*, 304 U. S. 111. This amount represented the value of a part of the original Wind River, Wyoming, reservation held to have been taken by the United States by placing thereon, without the consent of the Shoshone Tribe, a band of Arapaho Indians.[1] An appro-

[1] The history of the relations between the United States and the Shoshone Tribe which resulted in this judgment is fully set out in a prior decision in the same litigation. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

priation to pay the judgment was made in the Act of June 25, 1938, 52 Stat. 1114, 1156, and in the Shoshone Judgment Fund Act of 1939 (Appendix, *infra*, pp. 16–20) Congress prescribed the manner in which the judgment fund should be used. By Section 3 (a) of the latter Act, up to $1,000,000 was made available for expenditure, upon request of the Tribe and with the approval of the Secretary of the Interior, in the purchase of land as prescribed in Section 6. By Section 4, the Secretary was directed to establish "land-use districts" in the diminished and ceded portions of the Wind River Reservation,[2] and to consolidate the Indian and privately owned lands in such districts by exchange and purchase. By Section 5, the Secretary was directed to restore to tribal ownership all undisposed of surplus or ceded lands within the land use districts, and progressively to restore to tribal ownership the remaining non-Indian owned lands in such land use districts as and when acquired for Indian use pursuant to the provisions of the Act. Section 6 provided for the acquisition of lands by purchase with the funds allocated by Section 3 (a), with

[2] In 1904, by agreement with the Indians, the portion of the reservation lying north of the Wind River was ceded to the United States. Act of March 3, 1905, 33 Stat. 1016. Thereafter, that portion became known as the ceded portion and the remainder of the reservation as the diminished portion. Some of the ceded lands were eventually disposed of to white settlers and placed on the tax rolls of Fremont County. See the trial court's opinion, R. 26–27.

the approval of the Shoshone and Arapaho Tribal Councils, and with respect to such lands it was provided that "Title to all land purchases made hereunder shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming." The Act is silent with respect to the taxable status of lands so acquired by the United States.

Pursuant to the 1939 Act, the Secretary of the Interior purchased for these tribes various tracts which were originally tribal lands and which had been taxed by Fremont County, Wyoming, while in the hands of private persons (R. 27). All taxes due and owing, and which were a lien against these lands at the time title was acquired by the United States, were paid in full (R. 7, 22). These lands, after their acquisition by the United States, continued to be assessed and taxed against the United States by Fremont County, and some of the tracts were sold for non-payment of taxes thus levied (R. 27).

The United States accordingly filed its complaint (R. 1–15), the material allegations of which follow: That certain specific tracts were purchased by the United States as trustee for the Shoshone and Arapaho Tribes of Indians of the Wind River Reservation, Wyoming, pursuant to the Shoshone Judgment Fund Act of 1939, and that the United States was the owner thereof in

fee simple in trust for those tribes (R. 1–6); that the defendants, after title was acquired by the United States, and without the consent of the United States, assessed the lands for taxes for the year 1941 in the name of United States Trustee, and the taxes being unpaid, such lands were advertised for sale and were sold to Fremont County for the taxes claimed to be due for the year 1941; that the lands had also been assessed for the year 1942, and that assessment for 1943 was being threatened; that all taxes due and owing which were a lien upon the lands prior to the time title was acquired by the United States had been paid in full, and that the lands were not subject to taxation for the year 1941 and thereafter, and that the sale of the lands was null and void (R. 6–7). The complaint also alleged that certain additional tracts had been placed upon the assessment roll of Fremont County, and that the defendants were attempting to collect taxes thereon for 1942 and 1943 and that title to such tracts had been acquired by the United States prior to such assessment, the lands havings been acquired by purchase under the provisions of the 1939 Act; and that the tax sales and all assessments for taxes made since the Government acquired title were null and void (R. 7–14). The complaint prayed judgment quieting title in the United States, declaring that the defendants had no right, title, claim, or interest in the lands, that the de-

fendants and their successors in office be restrained from asserting any right, title, claim, or interest in such lands, and that they be restrained from taxing or attempting to tax them (R. 15).

Petitioners filed an answer, admitting all material allegations of the complaint (R. 15–20) except that it was denied that the assessment for taxes and sale of the lands in question were without the consent of the United States (paragraphs 3 and 4, R. 15, 16).

There being no genuine issue of any material fact, the United States filed a motion for summary judgment on the pleadings (R. 20). Appellees in effect joined in this motion by filing an amended answer asking for the dismissal of the complaint (R. 21–25).

After a hearing the trial court filed a memorandum opinion (R. 26–32), and on January 14, 1944, entered judgment overruling and denying the Government's motion for summary judgment, and dismissing the Government's complaint (R. 32–35). On October 10, 1944, the circuit court of appeals reversed the judgment and remanded the cause to the trial court with directions to enter judgment as prayed by the Government in its complaint.

ARGUMENT

1. The circuit court of appeals properly held that, in the absence of congressional consent, the lands in suit were not subject to state taxation.

Property of the Federal Government is immune from state taxation. *Van Brocklin* v. *Tennessee,* 117 U. S. 151. In that case this Court rejected a contention that property of the United States was exempt only if the state by statute declared it to be so or if such a provision was contained in the Enabling Act under which a state was admitted to the Union. Thus the Court held that the Federal Government enjoys a constitutional immunity from state taxation rather than an exemption dependent upon the will of the state. This immunity was found to be a necessary implication from the supremacy clause in Article VI of the Federal Constitution (pp. 155–156). The *Van Brocklin* decision has been adhered to in an unbroken line of decisions by this Court, the most recent of which are *United States* v. *Alabama,* 313 U. S. 274, 279; *Mayo* v. *United States,* 319 U. S. 441, 447; *United States* v. *Allegheny County,* 322 U. S. 174; *City of Cleveland* v. *United States and Federal Public Housing Authority; Boyle, County Treasurer* v. *United States and Federal Public Housing Authority;* and *Federal Public Housing Authority* v. *Guckenberger,* Nos. 68, 69, 388, October Term, 1944, decided January 2, 1945.

Such immunity exists "so long as title remains in the United States." *Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643, 645; cf. *City of Springfield* v. *United States,* 99 F. 2d 860, 863 (C. C. A. 1), certiorari denied, 306 U. S. 650. The same principle applies

to property whose title is held by the United States in trust for its Indian wards. In *United States* v. *Rickert,* 188 U. S. 432, it was ruled that allotted lands held by the Government in trust for an individual Indian could not be taxed by the state even to the Indian. Since the lands were held by the Government in execution of its plans relating to the Indians (p. 437) "there was no power in the State * * * to assess and tax the lands in question until at least the fee was conveyed to the Indians." After pointing out that the whole policy of Congress in dealing with its Indian wards might be defeated if the state could tax the lands, the Court quoted (p. 438) from the *Van Brocklin* decision and stated (p. 441): "* * * no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians." The immunity of such trust property was found to lie not only in Article VI of the Federal Constitution, but also in Article IV, section 3, vesting power to dispose of property of the United States (pp. 438–439). The Court approved (*ibid.*) an opinion of the Attorney General (19 Op. A. G. 161, 169), holding such property non-taxable by the state on the ground that the trust is "an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority." In *United States* v. *Allegheny County,* 322 U. S. 174, 188, this Court discussed the *Rickert* holding

with approval and in so doing recognized that the property in the *Rickert* case was immune and not simply exempt from state taxation.

Petitioners attempt (Pet. 14) to distinguish the *Rickert* case on the ground that the lands there involved were, prior to allotment, part of the public domain. But the holding in the *Rickert* case was not based on any such consideration. The principle of the decision, as already noted, was that the state could not, by taxation or otherwise, interfere with or jeopardize the execution of federal policy in dealing with its Indian wards. The same principle applies here. Moreover, the lands in suit were formerly tribal lands, and were purchased with funds which represented the value of tribal lands taken from the Tribe; and the title is held in the same way as lands which the Tribe has never relinquished, *i. e.*, the legal title is in the United States and the beneficial ownership is in the Tribes. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117. Congress clearly intended that such lands when acquired should be restored to their former status as tribal lands.

Since the state cannot tax allotted lands held by the United States in trust for its Indian wards, even to the Indians (see p. 8, *supra*), it follows that it cannot tax property held by the United States in trust for Indian Tribes, either to the United States or the Tribes. Cf. *The Kansas Indians*, 5 Wall. 737; *The New York Indians*, 5 Wall. 761.

Petitioners assert (Pet. 10–13) that the United States holds only a naked legal title and hence the lands should be held taxable on the theory of such cases as *Irwin* v. *Wright,* 258 U. S. 219, which hold that land may be taxed to an entryman where nothing remains to be done but the issuance by the United States of a land patent.[3] These cases are irrelevant. As pointed out in *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496, 505, such cases deal with a situation where the Government has no interest in the lands which would justify it in withholding a patent; since nothing but a ministerial act remains to be done, the entryman has a legal right to have the title conveyed. Here Congress has directed that the title be held by the United States in trust, and the Tribes have no legal right to compel a conveyance of title. That a title so held by the United States is not merely a naked fee, even where the land is allotted to an individual Indian, has al-

[3] Petitioner's assumption that if legal title were in the Tribes the land would be taxable is not warranted. The provisions of the Shoshone Judgment Fund Act of 1939 evidence a Congressional policy opposed to the emancipation theory. Congress has recognized the desirability of a return to the tribal status by the establishment of land use districts in tribal ownership and by provisions for the equipping of the Indians with farm implements, seed, etc. to enable them to subsist. There is thus no material difference between the lands here sought to be taxed and other tribal lands, and, therefore, it cannot be assumed that the lands would be taxable if title were in the Tribes. *The New York Indians,* 5 Wall. 761.

ready been held by this Court in *United States* v. *Rickert,* 188 U. S. 432, and *Minnesota* v. *United States,* 305 U. S. 382, 386. Obviously, it is also true where the Government holds the property in trust for Indian Tribes.

Petitioners (Pet. 17–22) rely chiefly on the case of *Shaw* v. *Oil Corp'n,* 276 U. S. 575. That case is not in point. The lands held taxable there were neither allotted nor tribal lands. They were purchased by the Secretary of the Interior for an individual Indian with restricted oil royalties; the claim to tax immunity was based solely upon what this Court denominated a "mere conveyancer's restriction" imposed by the Secretary and authorized by Congress as a step in the process of emancipation of the Indian. The Court was of the opinion that land so acquired by an Indian was taxable to the Indian in the absence of a statutory prohibition. The *Shaw* case is not apposite because here title is in the United States, rather than in the Indian.[4] The controlling effect of title being in the Government is clear from the decisions of this Court. *McCurdy* v. *United States,* 246 U. S. 263, 272; *McCurdy* v. *United States,* 264 U. S. 484, 486; *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 603. The doctrine of the *Shaw* case is applicable only where

[4] Other cases relied on by petitioner (Pet. 22–28) are likewise distinguishable on the ground that legal title was in the Indian rather than in the United States.

title is in some instrumentality other than the Government itself; where title is in the United States the courts will not go behind it. As said by this Court in *Mayo* v. *United States,* 319 U. S. 441, 447–448:

> The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. *Shaw* v. *Gibson-Zahniser Oil Corp.,* 276 U. S. 575, 578. But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.

Petitioners do not deny that this property is held by the United States in the exercise of a legitimate governmental function. This being so, and title being in the United States, the absence of express consent is fatal to petitioners' claim.

Petitioners call attention (Pet. 22) to prior Acts in which Congress has expressly prohibited taxation of property held in trust for Indians by the United States, and urge that, since in the present instance there is no such prohibition, consent of Congress to taxation of these lands may be read into the statute by implication. Too much significance may not be read into the failure of different Congresses to use identical language in various statutes. Cf. *United States* v. *Stewart,*

311 U. S. 60, 69; *Scripps-Howard Radio* v. *Comm'n*, 316 U. S. 4, 11. Since Congress must expressly consent to taxation of property title to which is held by the United States (see e. g., the quotation from the *Mayo* opinion at p. 12, *supra*; *United States* v. *Allegheny County*, 322 U. S. 174, 177) as distinct from its instrumentalities, such provisions in prior Acts are merely declaratory.

2. Even if it were not the rule that taxability of property held by the United States must rest upon an express Congressional consent, it is submitted that the decision of the circuit court of appeals is correct. *Shaw* v. *Oil Corp'n*, 276 U. S. 575, does not hold that, where Congress does not speak on the subject of tax immunity of the property of federal instrumentalities, the state may tax. It holds (p. 578) that in such cases the court will determine the question "from the purpose and character of the legislation."

As already shown, the policy of the legislation here pertinent was to restore lands formerly part of the tribal lands to the tribal status they formerly had, under the same conditions of title, *i. e.*, legal title in the United States and beneficial title in the Tribes. Thus, the Senate Committee on Indian Affairs in reporting the bill which became the Shoshone Judgment Fund Act of 1939, stated: "The bill, therefore, has the effect of restoring to the reservation lands which were previously ceded by the tribe to the United States for settlement by non-Indians", and further that "it has been the

special aim * * * in drafting the bill to safeguard the Shoshone patrimony as represented by the judgment fund which, by the decision of the courts, has been substituted for more than 1,000,000 acres of land owned and occupied exclusively by the Shoshone Tribe as part of its reservation prior to 1879." S. Rep. No. 746, 76th Cong., 1st sess., embodied also in H. Rep. No. 1112, reporting the same bill. In recommending passage of the bill, the Secretary of the Interior, in a letter incorporated in the committee reports, stated that "the future of the Shoshone and Arapahoe Tribes is in the livestock industry. Range is, of course, essential." And so the problem was met by the provisions of Section 4 providing for land-use districts on a tribal basis and by the direction to the Secretary to restore to tribal ownership all undisposed of surplus or ceded lands in such districts. Since certain lands within these districts were in non-tribal ownership, the acquisition of such tracts by purchase or exchange was provided for in Sections 1 and 6.

These provisions evidence a policy on the part of Congress to deal with these lands on a tribal basis. The policy is thus opposed to that which influenced this Court in the *Shaw* case, *viz.*, emancipation of the individual Indian to a point where he would be self-sustaining. Here a major phase of the Congressional policy of "safeguarding the patrimony" of the Tribes is the restoration of the

Wind River lands to their former status as tribal lands. If these lands can be taxed and sold by the state, the areas will again become checkerboarded and this objective of Congress be frustrated. In the *Shaw* case, 276 U. S. 575, 579, the Court explained the non-taxability of tribal lands as resting upon the proposition that they are "so intimately connected with the performance of governmental functions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation." Here the lands have been restored to tribal status by Congressional direction, and they are of precisely the character defined in the above quotation from the *Shaw* case.

CONCLUSION

The question presented was correctly decided by the court below. There is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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